Supreme Court, U.S.
FILED
JAN 3 1992
OFFICE OF THE CLERK

Nos. 90-1419 and 90-1769

In the Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL RAILROAD PASSENGER CORPORATION, ET AL., PETITIONERS

v.

BOSTON AND MAINE CORPORATION, ET AL.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

BOSTON AND MAINE CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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REPLY BRIEF FOR THE FEDERAL PETITIONERS

Respondent defends the judgment below on three grounds. It contends that (1) the ICC's order allowing Amtrak to condemn respondent's track and transfer it to Central Vermont is unauthorized by Section 402(d) of the Rail Passenger Service Act, 45 U.S.C. 562(d); (2) if authorized by Congress, the condemnation violates the Public Use Clause of the Fifth Amendment; and (3) if authorized and constitutional, the ICC's order is unsupported by sufficient factual findings. None of those claims has merit.

1. Section 402(d) authorizes Amtrak's condemnation of respondent's track

In the main, respondent's statutory arguments are addressed to the wrong issue; the question is not whether the pre-amendment version of Section 402(d) authorizes the condemnation in this case. Rather, the question is whether this transaction is authorized under Section 402(d) as amended by Congress in 1990—an amendment passed for the very purpose of overruling the court of appeals' initial and erroneous statutory interpretation in this case.

a. As to the effect of the amendment, there can be no doubt: Congress explicitly clarified that Amtrak may validly condemn property under Section 402(d) notwithstanding its intention to reconvey the interest it acquires to a third party. The 1990 amendment states: Amtrak "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act." Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9(a), 104 Stat. 4568, amending 45 U.S.C. 562(d)(1) [hereinafter ISBA]. The purpose of this amendment was to reject the court of appeals' reasoning that, because Amtrak intended to reconvey the fee interest it had condemned from respondent to another railway, that interest could not be "required for intercity rail passenger service" under Section 402(d).[1]

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[1] The centrality of that line of reasoning to the court of appeals' holding is evident throughout its opinion. See Pet. App. 18a ("the property to be acquired must be for the use of Amtrak, and not one which, as here, Amtrak had no intention of retaining"); *id.* at 20a (rejecting suggestion that Amtrak could condemn property to have "a responsible owner for the B&M segment, one that could be counted on to maintain the

Respondent barely attempts to reconcile the court of appeals' reasoning with the amendment. Respondent states (Resp. Br. 34) that "[t]he amendment * * * settles the point that Amtrak has statutory authority to subsequently convey property that it has properly condemned," but ignores the point that the very purpose of the amendment is to ensure that Amtrak can consummate a transaction such as this, in which Amtrak intends to reconvey condemned rail property, used in its provision of passenger train service, to a third-party owner.

Under respondent's approach to ISBA, the amendment serves no purpose at all. As we explain in our opening brief (Pet. Br. 28-29; see Amtrak Br. 40-41) Amtrak was fully empowered, prior to the 1990 amendment, to dispose of property it had acquired by condemnation or otherwise. The amendment was not needed to authorize such a conveyance; it was needed to ensure that a plan by Amtrak to convey condemned property would not invalidate the initial condemnation, as the court of appeals had ruled. Yet under respondent's approach, the amendment could never apply to any condemnation; if Amtrak attempted to rely on it to convey condemned property, that action would reveal that the property was not "required for intercity rail passenger service" by Amtrak in the first place.[2]

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tracks in a condition suitable for the Montrealer," because the statute focuses on "Amtrak's need" to own the property); *id.* at 23a (ICC's "construction of the phrase 'required for intercity rail passenger service' contravenes the plain meaning of section 402(d) as it allows the taking of property that was neither needed nor even wanted by Amtrak"). After ISBA, the court of appeals' construction is untenable.

[2] This is made clear by respondent's claim (Resp. Br. 21) that under Section 402, "Amtrak is not authorized to condemn

Respondent's only answer is to imply (Resp. Br. 33-34) that the 1990 amendment should not be taken seriously because it was introduced "on the last full day of the 1990 legislative session" and was not accompanied by committee reports. The amendment, however, became law in exactly the way the Constitution provides: it was passed by both Houses of Congress and signed by the President. Const. Art. I, § 7. Moreover, there can be no doubt that the legislators were aware of the purpose and effect of the amendment. Senator Jeffords' floor statement clearly explained that "this provision is intended to clarify the authority used by * * * [Amtrak] to acquire a portion of the Montrealer route in the States of Vermont and New Hampshire." 136 Cong. Rec. S17,668 (daily ed. Oct. 27, 1990). The Senator noted that the court of appeals had "ruled that Amtrak's subsequent transfer of the line to another railroad for rehabilitation and maintenance exceeded Amtrak's powers," and that the "amendment clarifies that, with this and any future case, Amtrak can convey interests in con-

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any more property or any larger interest in property than is *required* for intercity rail passenger service." Respondent goes on to say that its reading of the statute (even prior to the amendment) would not prohibit Amtrak from conveying property to a third party after having condemned it, such as when Amtrak condemns an easement to fulfill a maintenance need and then assigns the property and the maintenance obligation to a third party. Resp. Br. 22. But respondent offers no coherent analysis of the statute that distinguishes that case from this one, and its struggle to do so (*id.* at 22 n.8) simply reflects policy judgments about when it would be appropriate to find that Amtrak "requires" property that it does not wish ultimately to own. Before the amendment, policy judgments of that sort were for the ICC, not for the courts; by enacting the amendment, Congress itself established the controlling policy.

demned property to a third party when such conveyance furthers Amtrak's statutory purpose under the Rail Passenger Service Act, as it did in the Montrealer situation." *Ibid.* Senator Jeffords' remarks do not "vary" the language of the amendment (Resp. Br. 35); they underscore, with unusual clarity, that the intent of the amendment is to authorize Amtrak to condemn property even where, as here, it ultimately wishes to use, rather than to own, the property it has condemned.

b. Even as to the pre-amendment version of Section 402(d), respondent errs in arguing (Resp. Br. 19) that the statute was "clear" that Amtrak could not condemn property when all it really "required" was trackage rights or service agreements under Section 402(a). The statute says no such thing. As the ICC's order pointed out, the statute does not subordinate the condemnation power under Section 402(d) to a rule that Amtrak must first seek prescribed trackage or service rights under Section 402(a). Pet. App. 42a-43a, 115a-116a. Rather, the statute gives Amtrak the initiative in applying for the particular form of relief it desires. 45 U.S.C. 462(d) (Amtrak "may apply to the Commission for an order * * *."). Section 402(d) sets out the prerequisites to the exercise of condemnation authority, and exhaustion of any relief available under Section 402(a) is not among them.

The ICC must determine that the property to be condemned is "required for intercity rail passenger service," but the statute does not compel the ICC to adopt respondent's definition of that phrase.[3] Under

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[3] Respondent misstates our position as being that Amtrak "is entitled to any property it chooses" as long as the statutory "need" requirement of Section 402(d)(1)(A) and (B)

respondent's view of the "required" proviso, the ICC must examine whether Amtrak had a truly compelling "need" to take property, a need that could not be satisfied through some other remedy provided in Section 402. The difficulty with that contention is that the "required" phrase does not say this; it may reasonably be interpreted to mean instead that Amtrak is limited to taking property that is useful or appropriate in Amtrak's provision of intercity passenger train service, rather than property relating to some other line of business. Pet. Br. 17. The ICC, as the agency responsible for administering the statute, is authorized to resolve the ambiguity, see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and it did so here by upholding this transaction [4] and by rejecting respon-

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is satisfied. Resp. Br. 23-24. The Commission recognizes that the property must be "required for intercity rail passenger service"; the issue is what that phrase means.

[4] The ICC noted that Amtrak sought the condemnation here "so that [Montrealer] passenger service may be resumed over [respondent's] line," Pet. App. 122a, and it recounted Amtrak's explanation that "it was compelled to discontinue this service in April 1987 due to the deterioration of [respondent's] track segments along the route"; that Amtrak "cannot reach agreement with [respondent] for the resumption of this service"; and that respondent "is considering discontinuance of rail service altogether on the line." *Ibid.* Against that background, the ICC reasonably found that "Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line" in order to restore Montrealer service. *Id.* at 43a. Contrary to the repeated claim of respondent and its amici (Resp. Br. 2 n.1, 22 n.8, 42-43; Amici Concerned Railroads Br. 30), that finding was adequate. "The explanation may have been curt, but it surely indicated the determinative reason for the final action taken." *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973).

dent's view that Amtrak must show that no "lesser" interest than fee simple acquisition could possibly suffice.[5] The ICC's approach is a permissible one; it is consistent with the language of the statute and it reasonably implements the statute's purpose of giving Amtrak the remedies it needs to structure a network of routes for intercity rail passenger service.

Respondent contends (Resp. Br. 26-28) that the ICC's interpretation allows Amtrak to enter into arrangements that conflict with an asserted policy against cross-subsidization within the rail industry. The Rail Passenger Service Act, however, establishes as goals for Amtrak the "[e]ncouragement of * * * the private sector to share the costs of operating rail passenger service * * * in order to minimize Federal subsidies" and the "[d]evelopment of service on rail corridors, subsidized by * * * private parties." 45 U.S.C. 501a(2) and (7). Section 402(a) explicitly allows the ICC to grant Amtrak prescribed trackage rights upon paying the railroad's incremental cost—a rate that provides a subsidy to Amtrak since it does not include a share of fixed costs.[6] In light of those

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[5] The ICC did not delineate all of the other possible situations to which Section 402(d) might apply beyond the facts presented to it. Accordingly, respondent's claim (Resp. Br. 43 n.28) that the decision "undermine[s] any limitation on the use of section 402(d) authority" is incorrect.

[6] The cross-subsidy that Section 402(a) prohibits is the cross-subsidy of a freight railroad *by Amtrak*, when Amtrak is the party granting trackage rights. 45 U.S.C. 562(a)(2). Respondent cites no case applying a similar policy to Amtrak's receipt of services. Most of the "cross-subsidy" cases cited by respondent (Br. 25 n.16) involve freight trains, not passenger trains, and the one that does involve passenger trains does not involve Amtrak. In any event, the Commission subsequently vacated it when the parties settled. *Chicago*

provisions, the ICC's approval of a reconveyance transaction under Section 402(d) is not invalid because it permits a more efficient arrangement for the use of the property by Amtrak.

Nor is the validity of the ICC's construction undermined by a supposed conflict with "settled principles of eminent domain law." Resp. Br. 30. Respondent argues that Section 402(d) must be construed narrowly because it confers eminent domain authority on a private corporation, and because of a presumption that a private condemnor may take only the amount of property that is strictly necessary to fulfill the public use that justifies the taking. The eminent domain authority in this case, however, is administered by the ICC, an agency of the United States.[7] The ICC is required to make the determinations identified by Congress to support the condemnation, and it has the power to reject applications that constitute

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[7] The procedure for condemnation under Section 402(d) thus contrasts with Amtrak's eminent domain authority under Section 305(d), 45 U.S.C. 545(d), for the taking of non-rail property. Section 305(d) permits Amtrak to file a condemnation petition in district court; the ICC is not involved. In *National R.R. Passenger Corp.* v. *Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), cert. denied, 484 U.S. 954 (1987), the court found Amtrak's rights under Section 305(d) to be of the more "limited" condemnation authority—because exercised by a private party rather than the government—which does "not include sovereign powers greater than those expressed or necessarily implied." *United States* v. *Carmack*, 329 U.S. 230, 243 n.13 (1946) (dictum). The ICC's integral participation in a taking under Section 402(d) distinguishes that provision from Section 305(d).

an abuse of the Act. See Pet. App. 41a-42a (finding that Amtrak "has not abused the process available under § 402(d)" in this case). Cf. *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 365 (1984).

In entrusting Amtrak's condemnation of rail property to the administration of the ICC, Congress invested the *agency* with the power to resolve the policy questions raised by ambiguous statutory provisions; the ICC is not required to use common law presumptions that apply when *courts* must fill gaps in vague statutes. *Chevron* mandates judicial deference to the ICC's reasonable interpretations of a statute when Congress has not spoken to the precise issue; that rule does not contemplate judicial review to see whether the agency's analysis accords with how a court might have interpreted the same provisions in light of common law presumptions that may or may not accord with agency policy and expertise. 467 U.S. at 843-844.[8]

2. Section 402(d), as construed by the ICC, is constitutional

Respondent contends (Resp. Br. 36) that, if the ICC did permissibly construe Section 402(d), the taking in this case violates the Public Use Clause of the Fifth Amendment because it permits "the transfer of private property from one private owner to

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[8] See *Michigan Citizens for an Independent Press* v. *Thornburg*, 868 F.2d 1285, 1292 (D.C. Cir.) ("*Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable *agency* interpretations of ambiguous statutes. If a statute is ambiguous, a reviewing court cannot reverse an agency decision merely because it failed to rely on any one of a number of canons of construction."), aff'd by an equally divided Court, 493 U.S. 38 (1989).

another, with no corresponding change in public use." That claim is flawed both factually and legally.[9]

The ICC did not simply approve a transfer of the line from A to B. The order instead approved a transfer from a landlord that had allowed the line to deteriorate, had no incentive to maintain the line in the condition required by Amtrak, and had no agreement with Amtrak permitting Amtrak to run its trains on the track,[10] to a landlord that had maintained its portion of the line in the past (J.A. 48), had every incentive to do so because (unlike respondent) it had no alternative route for its trains, and was willing to enter into a 20-year trackage rights agreement with Amtrak. The result was not simply a change in ownership from A to B but a consequent

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[9] Also flawed is the suggestion of Amici Concerned Railroads (Br. 23-30) that Section 402(d) should be construed to avoid reaching this constitutional question. This Court has remarked that it "cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States* v. *Locke*, 471 U.S. 84, 96 (1985), quoting *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379 (1933). In light of Congress's 1990 amendment of Section 402(d), that principle directly applies here. In any event, there is no reason to avoid the issue because Section 402(d), as construed by the ICC, is constitutional.

[10] See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, Nos. 72 & 74 (Nat'l Arb. Panel Nov. 7, 1988), slip op. 1. Respondent's assertion (Resp. Br. 36) that the use of the line did not change because, both before and after the condemnation, "Amtrak had a contract for the use of that line" is incorrect. Respondent gave notice to Amtrak on May 6, 1987, that it was cancelling the Operating Agreement between the parties; respondent contended in the D.C. Circuit that the trackage rights agreement with Amtrak had expired, see Pet. Br. 5 n.4; and respondent informed the Commission that the agreement between the parties was "terminated." J.A. 97.

change in use allowing restoration of Montrealer service over the line.[11]

In the face of that record, there is no factual basis for respondent's claim that the condemnation and transfer of the line did not bring about a "changed," and clearly valid, public use, even under the legal test respondent advocates. It has long been settled that the takings power can be used to transfer property between railroads in order to permit the development of new railroad uses. *Richmond F. & P. R.R.* v. *Louisa R.R.*, 54 U.S. (13 How.) 71 (1851) (upholding the authority of a State to exercise eminent domain to take the property of one railroad that is authorized to run passenger trains and convey it to another railroad that is authorized to run freight trains).

Respondent's constitutional claim is also unsound as a matter of legal principle. This Court has held that the determination of what constitutes a "public use" is essentially one for the legislature, and the legislature has wide latitude to authorize the compensated transfer of property between private own-

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[11] Prior to the condemnation, respondent's line was not used for any passenger train service. Respondent had been granted permission in 1967 to abandon its common carrier obligation to provide passenger service (see Pet. Br. 5 n.3), and Amtrak discontinued Montrealer service on April 5, 1987, nearly one year before instituting condemnation proceedings (Pet. App. 9a, 121a-122a). Following the condemnation, however, respondent's former line is used both for high-speed freight traffic and for passenger service by Amtrak's Montrealer. After being condemned and transferred to Central Vermont, the line was upgraded by Central Vermont (with $3.1 million in funds supplied by Amtrak and additional funds supplied by the State of Vermont, see Vermont Br. 9-10 & n.8) and Montrealer service has resumed. Pet. App. 13a.

ers in order to accomplish a permissible public objective. In *Berman* v. *Parker*, 348 U.S. 26, 33 (1954), this Court upheld legislation authorizing the taking of real property in blighted areas of the District of Columbia for the purpose of transferring it to private entities that would redevelop it. *Id.* at 28-30. The Court made clear that "[t]he role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one." *Id.* at 32.

In *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 242-243 (1984), the Court enunciated an equally broad view of the legislative power to authorize compensated transfers between private owners. There, in order to reduce the concentration of ownership of real property, Hawaii established a program authorizing the transfer, with just compensation, of property titles from lessors to lessees. In holding that the program satisfied the requirements of the Public Use Clause, the Court stated that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Id.* at 239, quoting *Berman*, 348 U.S. at 32. The role of a reviewing court is therefore "extremely narrow," and a legislative judgment as to a public use will be accepted "unless the use be palpably without reasonable foundation." 467 U.S. at 241, quoting *United States* v. *Gettysburg Elec. R.R.*, 160 U.S. 668, 680 (1896). "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." 467 U.S. at 241.[12]

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[12] In light of those holdings, respondent's reliance (Resp. Br. 37-38) on a handful of turn-of-the-century state cases is

Section 402(d) easily passes muster under those principles. As amended in 1990, Section 402(d) authorizes Amtrak to convey condemned rail property to a third party only "if such reconveyance is found by the [ICC] to further the purposes of this [Rail Passenger Service] Act." The purposes of the Act—the provision of safe, reliable, and economical passenger train service—are undeniably ones within Congress's power to pursue. See *United States* v. *Joint Traffic Ass'n*, 171 U.S. 505, 570 (1898) ("Taking land for railroad purposes is a taking for a public purpose, and the fact that it is taken for a public purpose is the sole justification for taking it at all. The business of a railroad carrier is of a public nature.").[13]

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misplaced. No decision of this Court has struck down a taking on the "no change of use theory"; nor do the Nineteenth Century cases of this Court cited by respondent articulate such a limitation on the condemnation power. *Berman* and *Midkiff* make clear that, on the level of generality at which respondent analyzes the issue, it is fully permissible to change the ownership of private property without changing its use, provided there is an underlying public purpose to which the condemnation is rationally related. See *Midkiff*, 467 U.S. at 243-244 ("The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. * * * In such cases, government does not itself have to use the property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.").

[13] As respondent acknowledges (Resp. Br. 42 n.27), it has long been settled that railroad service is a "public use." See *Secombe* v. *Railroad Co.*, 90 U.S. (23 Wall.) 108, 118 (1874); *Olcott* v. *The Supervisors*, 83 U.S. (16 Wall.) 678, 694-695 (1872). Likewise, it is settled that the public purposes served by a national rail system may take precedence over the interests of particular private owners. See *New Haven Inclusion*

Section 402(d) is also a rational means to implement Congress's purpose. This case illustrates how Amtrak's condemnation of rail property and subsequent transfer to another railroad can benefit the operations of a national passenger train network. Respondent's parent owns a rail line that parallels the track at issue in this case, and thus respondent had neither the need nor the desire to maintain the track in the high-speed condition that Amtrak requires. J.A. 38-39. The predictable result was poor maintenance and frequent delays. J.A. 41, 43. Central Vermont, in contrast, has no alternative line and therefore has an independent incentive to upgrade the track to high-speed condition and to maintain the track in good working order. J.A. 116, 118, 121. Transfer of the track to Central Vermont therefore affords substantial benefits to the regular and efficient operation of the national passenger train service that Amtrak was created to provide.[14]

Whatever policy objections respondent may have to this approach, those objections do not amount to a valid claim under the Public Use Clause. This Court stated in *Midkiff* that "[a] purely private taking"—one "executed for no reason other than to confer a

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Cases, 399 U.S. 392, 491-492 (1970); *Reconstruction Finance Corp.* v. *Denver & R.G. W. R.R.*, 328 U.S. 495, 535-536 (1946). Against that background, there is no reason to think that any compensated transfer of property between railroads, carried out under conditions established by Congress, raises an issue under the Public Use Clause.

[14] Contrary to respondent's contention (Resp. Br. 22 n.8), the ICC's counsel in the court of appeals did not disavow the view that another party besides respondent was needed to have the line rehabilitated; what the ICC's counsel said was that the root of the problem was not respondent's competence to maintain the line, but its "willingness to commit the resources to do it." Tr. 35.

private benefit on a particular private party"—would not be able to "withstand the scrutiny of the public use requirement." 467 U.S. at 245. Section 402(d) does not authorize a "purely private taking." If Amtrak sought to take property solely to further the objectives of a private party, the ICC could not, and would not, authorize the transaction. But the ICC rejected respondent's contention in this case that the taking and reconveyance of its property were designed solely to further private aims of Central Vermont, and that conclusion is amply supported by the record. Pet. App. 41a-42a.

The transaction in this case allowed Amtrak to rehabilitate a rail line that was badly dilapidated, and to obtain from Central Vermont a guaranty of 20 years of proper maintenance and a commitment giving Amtrak the right to operate its trains at a reasonable compensation level. Moreover, Amtrak contributed $3.1 million towards the rehabilitation of the line that Congress specifically appropriated to revitalize the Montrealer. Pet. App. 41a-42a. The State of Vermont and the Commonwealth of Massachusetts supported the transaction before the ICC, as did all of the affected shippers. *Id.* at 85a. And the ICC specifically determined that the transaction was in the public interest.[15] In light of that record, respondent cannot sustain its claim that this transaction violates the Public Use Clause.

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[15] The ICC considered and rejected respondent's claim that Amtrak had "abused the process available under § 402(d) by means of its dealings with [Central Vermont]." Pet. App. 42a. Prior to its approval of the instant transaction, the ICC also made clear that it "will not permit transfers that are not in the public interest and consistent with the relevant statutory criteria." *Id.* at 43a.

3. The ICC's factual findings adequately support its order

Finally, respondent contends that the ICC's order is infirm for lack of adequate factual findings. Resp. Br. 40-45. First, respondent claims that the ICC's findings are insufficient to establish that the property was "required for intercity rail passenger service." This argument, however, simply reformulates respondent's mistaken claim that, before permitting a condemnation-and-transfer transaction, the Commission must consider whether trackage rights, an easement, a lease, or some other lesser estate would suffice. Resp. Br. 43. As the ICC construed the statute, those findings were not necessary, and as Congress confirmed in ISBA, even when Amtrak's ultimate aim is use, not ownership, Amtrak may still condemn rail property if the ICC finds that the transaction will further the purposes of the Rail Passenger Service Act.

Second, respondent faults the ICC's consideration of the issue of whether respondent would suffer "significant impairment" of its common carrier functions as a result of the condemnation. 45 U.S.C. 562(d)(1)(A). As we explain in our opening brief (Pet. Br. 31-32), the ICC expressly conditioned this condemnation on a grant of trackage rights to respondent that ensured that respondent could serve its existing local customers. The ICC was entitled to find, and did find, that that agreement adequately protects respondent's ability to fulfill its common carrier obligations. Pet. App. 43a.

Third, respondent challenges the agency's conclusion that the parties were "unable" to reach agreement for the sale of the property. It is clear enough, however, that respondent told Amtrak in unqualified terms that it saw "no need to pursue the very com-

plex 'offer to purchase' " made by Amtrak, J.A. 60, and the "detailed history of [Amtrak's] dealings and negotiations with B&M over the Conn River Line" demonstrated that the parties' positions were unlikely to converge. The ICC permissibly concluded that the parties were unable to agree on a sale. Pet. App. 130a.

In any event, if the ICC's findings were not sufficient to support its order, or if the ICC erred in its interpretation of the criteria for establishing Amtrak's right to condemn the track at issue, the proper disposition would be to remand the case to the ICC for additional explanations, or for an evaluation of facts in light of the correct legal standard. See *ICC* v. *Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901); *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981).

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For the foregoing reasons and the reasons set forth in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

ROBERT S. BURK
General Counsel
Interstate Commerce Commission

JANUARY 1992

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* The Solicitor General is disqualified in this case.

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